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20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B-6

FILE:

Office: CALIFORNIA SERVICE CENTER

AUG 02 2004
Date:

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, Texas Service Center. On further review of the record, the Acting Director, California Service Center determined that the beneficiary was not eligible for the benefit sought. The acting director served the petitioner with notice of intent to revoke approval of the preference visa petition, together with her reasons therefore. The director served the petitioner with a second notice of intent to revoke approval of the petition, augmenting the first notice with additional grounds for revocation, together with his reasons therefore. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner sought to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is engaged in the sale and export of construction machinery and health care products. It sought to employ the beneficiary permanently in the United States as a contract clerk. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) (SRC 02 075 50997) was filed on January 3, 2002 at the Texas Service Center. It was initially approved on February 23, 2002. The alien beneficiary, through counsel, filed an application to adjust his status to that of lawful permanent resident at the California Service Center. Following the receipt of information from both the petitioner and beneficiary relevant to the beneficiary's application to adjust to permanent resident status, the acting director concluded that the I-140 had been approved in error and issued an intent to revoke the petition on April 15, 2002. The acting director initially concluded that the petitioner had failed to establish that the occupation of contract clerk could be classified as a profession pursuant to 8 C.F.R. 204.5(k)(2). The acting director also concluded that the petitioner had failed to establish that the beneficiary's educational credentials conformed to the position's requirements set forth on the approved labor certification. The acting director further concluded that the alien beneficiary had no intention of undertaking a permanent employment relationship with the petitioner. The director subsequently issued another intent to revoke the petition on June 13, 2002, determining that the petitioner had additionally failed to establish its continuing ability to pay the proffered wage as of the visa priority date.

The petitioner's response and subsequent submission of additional evidence failed to convince the director to substantially revise his decision and the petition's approval was revoked on July 18, 2002, pursuant to section 205 of the Act, 8 U.S.C. § 1155, on three of the grounds described above. The director withdrew his consideration of the petition as that of a professional, under 203(b)(3)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), as third preference visa classifications also include skilled workers, which counsel's June 10, 2002, response to the intent to revoke points out. Counsel asserted that the I-140 was submitted for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

On appeal, counsel submits additional evidence and maintains that the beneficiary intends to undertake a permanent employment relationship with the petitioner, that the beneficiary's baccalaureate degree is sufficient to fulfill the terms of the position offered, and that the petitioner has established its ability to pay the proffered wage.

Section 205 of the Act, provides that for good and sufficient cause, at any time, any petition approved under section 204 of the Act may be revoked.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of

performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(l)(3) also states in pertinent part:

(ii) *Other documentation—*

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a petitioner must show that the beneficiary possesses the education and experience specified on the labor certification as of the petition's filing date. The petitioner must also establish that it has had the continuing ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt by any office within the DOL's employment service system. 8 C.F.R. 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is February 10, 2000. The visa petition indicates that the petitioner was established in 1991 and has two employees. The proffered wage as stated on the Form ETA 750 is \$14.62 per hour, based on a 35-hour week, which amounts to \$26,608.40 annually. Part A, item 14 of the ETA 750, states that the applicant for the job of contract clerk must have 4 years of college culminating in a "Bachelor or Foreign Equivalent" degree with a major in legal studies.

With the petition, the petitioner submitted copies of two diplomas held by the beneficiary as proof of the beneficiary's educational credentials. One is a Bachelor of Arts (Pass) degree awarded in 1967 from the University of Karachi, Pakistan. The other diploma is a Bachelor of Laws, conferred in 1977, by the University of Karachi. Along with these diplomas, the petitioner submitted an evaluation report, dated May 4, 1998, by Bradley L. Spencer of the Foundation for International Services, Inc. (FIS). Mr. Spencer states that the beneficiary's Bachelor of Arts degree represents the equivalent of two years of academic study at an accredited U.S. college or university and, when combined with the beneficiary's Bachelor of Laws degree, represents the equivalent to a U.S. bachelor's degree in legal studies.

With counsel's response to the second notice of intent to revoke the petition, additional evidence was submitted in support of the beneficiary's educational background. A letter dated February 6, 2002, from [REDACTED] Vice-President of Evaluations, from the Foundation for International Services, Inc. (FIS), indicates that in Pakistan, a Bachelor of Laws degree requires the completion of two years of a lower-division preparatory curriculum comparable to an associate degree in the United States [REDACTED] states that the beneficiary's first Bachelor of Arts degree represents this preparatory curriculum and is required for entrance to the Bachelor of Laws program. The result is that the Bachelor of Laws degree represents a four-year degree. In addition to this letter, counsel submitted copies of reference materials from a 1994 American Association of Collegiate Registrars and Admissions Officers (AACRAO) publication and an extract from *A Guide to Educational Systems Around the World* (edited by Shelley M. Feagles). The AACRAO extract indicates admission to a U.S. master's degree program may be considered if an applicant possesses a Bachelor of Laws diploma from a Pakistani academic institution along with the appropriate documentation of mark sheets.¹ The other excerpt from *A Guide to Educational Systems Around the World*, reflects that a two or three-year Bachelor of Laws degree requires a Bachelor of Arts (Pass) for admission.

The director concluded in his notice of revocation, that while the beneficiary may possess a foreign equivalent degree to a U.S. bachelor's degree in legal studies, it cannot be determined conclusively without the beneficiary's transcripts. On appeal, counsel asserts that she has attached the university transcripts and that the opinions of the credentials evaluators should not be ignored. In addition to the previously submitted copies of the beneficiary's diplomas, academic reference sources, and the statements of [REDACTED], counsel submits copies of two "marks certificates," on appeal. One indicates that the beneficiary passed an examination in June 1967 at the [REDACTED], and the other indicates that he failed a final examination held in June 1968 at the University of [REDACTED]. No marks certificate from his Bachelor of Laws degree was submitted, as recommended by AACRAO, and no other evidence was offered to substantiate his completion of four years of university-level coursework claimed by the credentials evaluators.

Because neither the Act nor the regulations indicate that a bachelor's degree must be a United States degree, CIS will recognize a foreign equivalent degree to a United States baccalaureate. CIS uses a credential evaluation organization's determination as an advisory opinion only. *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988). It is also noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245. In this case, the AAO cannot conclude that the director erred in determining that the first-hand evidence submitted to the record was not sufficiently persuasive to establish that the beneficiary had satisfied the educational requirements of the job offered as set forth in Part A, item 14 of the ETA 750. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) provides that evidence of a bachelor's degree "shall be in the form of an official college or university record." While relating to professionals, we find it applicable to what constitutes evidence of a degree.

The director also found that the beneficiary's assertion of his intent to work for the petitioner in the proffered full-time, permanent position in Florida was unpersuasive. The record indicates that the approved labor certification was issued to the petitioner as a prospective U.S. employer located in Altamonte Springs, Florida. The petitioner's address subsequently appears on the I-140 as being in Maitland, Florida.

Part B of the ETA 750, signed by the beneficiary, indicates that he has worked for the petitioner since April 1999,

¹ The 5th edition of the AACRAO guide published in 2003 presents the same information.

averaging 20 hours per week. His Wage and Tax Statements (W-2s), issued by the petitioner, for 2000 and 2001, are contained in the record. In 2000, the petitioner paid the beneficiary \$14,136 in wages. In 2001, the petitioner paid the beneficiary \$12,528 in wages.

In an April 12, 2002, response to the director's request for additional evidence relating to the beneficiary's presence in California, instead of Florida, the original intended area of employment, counsel faxed a copy of an April 2002 letter from the petitioner's president, [REDACTED] states that the beneficiary was temporarily transferred in October 2001 to California, in accordance with his most recent H-1B application, "in order to establish a West Coast branch of [the petitioner]. Please note that the owner of the company is in charge of the primary East Coast operations. [REDACTED] explains that the petitioner made a business decision to expand into Asian markets and to open a satellite office in Los Angeles where the petitioner "continues to perform his duties as a contract specialist." The record also contains a March 1, 2002, letter from [REDACTED] whereby he confirms that a full-time position of a contract clerk remains offered to the beneficiary at a salary of \$511.70 per week. Finally, the beneficiary's letter, dated April 2, 2002, states:

Please be advised that I have been employed with Bloomington Trading Company, Inc. since 10/01/1999 pursuant to my H-1B status.

In order to assist in the experience [sic] of the company's operations and the establishment of a West Coast branch of [REDACTED] I was transferred to California in October 2001, pursuant to my most recent H-1B application, which specifically states that I will temporarily remain in California performing my H-1B duties.

However, please note that upon approval of my adjustment of status application, I will assume full time employment in Florida for the position offered on my approved labor certification.

In his notice of revocation, the director stated that no W-2s were submitted to corroborate the petitioner's claim relating to the reasons that the beneficiary was transferred to California. The AAO does not find a basis for that statement, as the petitioner has submitted W-2s to the record showing wages paid to the beneficiary in 2001, as well as a copy of a payroll record covering the period from February 16, 2002 to March 15, 2002, suggesting that the petitioner paid him \$12.00 per hour. The director also stated that a request for additional evidence issued on April 11, 2002, went unanswered. The director concludes that the evidence does not establish why the beneficiary moved to California or suggest that he will return to Florida to accept the offered position. The director references the reasons stated in the April 15, 2002, intent to revoke. In that document, the acting director does acknowledge submission of the beneficiary's 2001 W-2s. She notes that the beneficiary was employed in other jobs as shown by copies of other 2001 W-2s submitted to the record. They show that he earned \$25,401.79 from Major Protective Services, Inc. in California; \$2,520 from Creative Childcraft in California; and \$208.12 from [REDACTED], as well as the W-2 showing the \$12,528 received from the petitioner. The acting director found it unreasonable to believe that the beneficiary had been employed at all by the petitioner in California or that he had earned over \$25,000 between October 2001, the date of his alleged transfer, and the end of the year, at Major Protective Services.

In her response to the acting director's intent to revoke the petition, counsel concedes that the beneficiary did not comply with the terms of his H-1B status, but asserts that it can be handled in the consideration of the application for adjustment of status under section 245(I) of the Act relating to unauthorized employment. Counsel also attaches an affidavit from the beneficiary, dated June 4, 2002. In this statement, the beneficiary states that although he does live in California, he fully intends to report for work for the petitioner upon approval of his adjustment of status application. He states that the most important reason is that becoming a legal permanent resident "outweighs the

monetary advantage of remaining in California,” and that the cost of living is lower in Florida.

On appeal, counsel resubmits the petitioner’s April 2002 letter explaining the petitioner’s desire to establish a satellite office in California and the beneficiary’s June 4, 2002, affidavit. Counsel maintains that the director ignored the evidence documenting that the petitioner and the beneficiary intend to establish a permanent employment relationship.

When evaluating employment based preference petitions, CIS will examine the intent of the alien to take the position offered and the intent of the employer to hold the position open for the alien. *Jang Man Cho v. INS*, 669 F.2d 936 (4th Cir. 1982). Although it is noted that the director misstated some of the facts of the case, there is enough doubt in the petitioner’s statement relating to the timing of the beneficiary’s transfer to California to question the veracity of other documentation contained in the record. Even overlooking the beneficiary’s misstatement of the dates of his employment with the petitioner as either beginning in April 1999, as stated on the ETA 750B, or October 1999, as presented in his April 2, 2002, letter, as previously noted, both the petitioner and the beneficiary have submitted statements to the record emphasizing that the beneficiary was transferred by the petitioner to California in October 2001 in order to establish a satellite office of the petitioner’s business.

Upon closer examination of the record, it is noted that the beneficiary’s Form 1040, U. S. Individual Income Tax Return for 1999 bears a Los Angeles, California address. His 2000 individual tax return, with a May 16, 2001 signature date, also bears a Los Angeles, California address. A copy of a rental agreement for Apt. 4, 10727 Woodbine, Los Angeles, CA 90039, contains the beneficiary’s name as a lessee and references a beginning rental date of March 20, 1999. These documents raise doubts as to the actual date the beneficiary’s presence in California commenced and lend support to the director’s reasonable conclusion that the beneficiary’s ability to earn over \$25,000 from another employer in California probably represents employment predating October 2001. Counsel does not rebut this observation on appeal. This evidence indicates that the petitioner misrepresented the facts of this case regarding the alleged transfer and employment of the petitioner.² In view of these discrepancies, the AAO cannot conclude that the director erred in finding that the evidence raises questions as to the validity of the job offer and the alien’s intentions to pursue the certified job. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592.

The director also based the revocation of the approved petition on the petitioner’s ability to pay the proffered wage. On April 11, 2002, the director advised the petitioner to submit additional evidence relating to its ability to pay the proffered wage. The petitioner was specifically advised to submit either its federal tax return, Form 1120, an annual report, or an audited financial statement for the 2001 calendar year. In response, on April 12, 2002, the petitioner submitted unaudited financial statements for the period ending December 31, 2001. In the June 13, 2002, intent to revoke, the director found that the petitioner had failed to establish its continuing ability to pay the proffered wage and submitted this as an additional ground for revocation of the approved petition. Although the director found that the petitioner’s documentation had established its ability to pay the proffered wage in 2000, the evidence did not support its continuing ability subsequent to that year.

On July 12, 2002, counsel responded to the director’s supplemental grounds presented in the June 13, 2002, intent to revoke. Counsel requested a 90-day extension of time to file a response to the director’s intent to revoke because the

² Labor certifications can be subject to invalidation by CIS or the State Department upon a determination that the certification was obtained through fraud or willful misrepresentation of a material fact. 20 C.F.R. § 656.30(d).

petitioner had not yet filed its 2001 federal tax return. Counsel submitted a copy of an accountant's letter affirming that an extension of time had been requested to file the 2001 corporate tax return.

The director denied the petitioner's request for an extension of time to file a response to the intent to revoke and revoked the petition's approval on July 18, 2002. The director noted that the documents that the petitioner did submit relating to 2001 showed that its current liabilities exceeded its current assets.

On appeal, counsel simply asserts that the I-140 was originally approved at the Texas Service Center and that this issue should not be revisited. She maintains that the petitioner's continuing ability to pay the proffered wage may be properly addressed in an adjustment of status context, but bore no relevance to the revocation of the I-140, because the ability to pay for the year 2000 had already been established. The AAO cannot agree.

The petitioner's continuing ability to pay the proffered wage until the alien gains permanent resident status is clearly at issue pursuant to 8 C.F.R. § 204.5(g)(2), relating to employment based petitions. If the beneficiary's 2000 W-2 is reliable evidence of actual wages paid to the beneficiary, then the petitioner need only show that either its net income or its net current assets could cover the difference of \$12,472.40, between the actual wages paid to the beneficiary and the proffered wage. According to the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, its 2000 net income of \$24,368 could cover the difference. The fact that its continuing ability to pay the proffered wage was put into question through a request for evidence pertinent to the I-485 adjudication was a legitimate question for the director to address because it also affected the adjudication of the revocation of the I-140, approved in 2002, where the record contained no financial data for 2001. It was reasonable for the director to apply the information received, to his consideration of the revocation of the I-140 because it raised questions as to the petitioner's ability to pay the proffered wage prior to the original approval of the I-140 in February 2002.

The director's observations about the petitioner's current assets and liabilities expressed on its unaudited financial statement are also problematic because the unaudited financial statements submitted in response to the director's request for evidence are not persuasive evidence of a petitioner's ability to pay a proposed wage offer. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not convincing evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on a petitioner's federal income tax returns, if provided, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The AAO cannot conclude that the director erred in revoking the approval of the petitioner's I-140 based on the additional grounds of the petitioner's failure to show its continuing ability to pay the beneficiary's annual wage offer of \$26,608.40. While additional evidence may be offered, it must contain sufficient independent probative

value in order to be accepted as competent. Here, the petitioner's submission of its 2001 unaudited financial statements does not provide a sufficiently persuasive basis to establish its ability to pay the beneficiary's proffered wage subsequent to the year 2000.

Upon review, the petitioner has been unable to present sufficient evidence to overcome the findings of the director in his decision to revoke the approval of the petition. The petitioner has not established eligibility pursuant to section 203(b)(3)(A)(i) of the Act and the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.